Office-Supreme Court, U.S.
FILED
APR 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1577

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

FRANK J. KELLEY
Attorney General

Counsel of Record:

Louis J. Caruso
Solicitor General

Henry J. Boynton
Assistant Attorney General

Attorneys for Appellee The Agricultural Marketing and Bargaining Board

Business Address:
Plaza One Building, Suite One
Lansing, Michigan 48913

(517) 373-3517

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1983

QUESTION PRESENTED

Is the Michigan Agricultural Marketing and Bargaining Act in conflict with and therefore preempted by the Federal Agricultural Fair Practices Act of 1967?

TABLE OF CONTENTS

	Page
Question Presented	i
Index of Authorities	iii
Motion to Dismiss Or Affirm	1
Counterstatement of the Case	
A. Nature of the Case	1
B. Parties	2
C. Proceedings Below	3
Argument	
I. THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT	
A. Congress Has Not Preempted The Field With Regard To Agricultural Marketing	3
B. No Conflict Exists Between The Federal Act And Michigan Act	4
C. The Federal Act Creates No Absolute Right In Farmers To Join Or Not Join Or Bargain Through A Cooperative	5
D. The Federal Act Creates No Right In The Handlers To Deal Directly With An Individual Producer	6
(1) Legislative History	6
(2) Case Law	12
CONCLUSION AND PRAYER	15

INDEX OF AUTHORITIES

Cases Page

Butz v *Lawson Milk Co*, 386 F Supp 227 (ND Ohio, 1974) 12, 13

Florida Lime and Avocado Growers, Inc v *Paul*, 373 US 132; 83 S Ct 1210; 10 L Ed2d 248 (1963) 3, 4

Garrison v *Dairymen*, (Civil Action) 80-1080-3 (D SC 1980) 12, 14

Jones v *Rath Packing Corporation*, 430 US 519; 97 S Ct 1307; 51 L Ed2d 604 (1977) 4, 5, 14

Ray v *Atlantic Richfield*, 435 US 151; 98 S Ct 988; 55 L Ed2d 179 (1978) 4

Rice v *Sante Fe Elevator Corporation*, 331 US 218; 67 S Ct 1146; 91 L Ed 1447 (1947) 3

Constitution

Constitution of the United States

Article 6, CL 2 3

10th Amendment 3

Statutes

Agricultural Fair Practices Act of 1967, 7 USC

§§ 2301-2306 ..... 1, passim

7 USC § 2301 7

7 USC § 2303 5

7 USC § 2303(a) 5, 6, 13

7 USC § 2304 ..... 5, 6, 7, 10, 11, 13, 14

7 USC § 2305(d) 4

Michigan Agricultural Marketing and Bargaining Act, 1972 PA 344, as amended, MCLA 290.701 *et seq*, MSA 12.94(101) *et seq* ..... 2, passim

1972 PA 344, § 15 6

Other **Page**

HR Rep No. 824, S Rep No. 474, 90th Cong, 2nd Sess, Reprinted in 1968 Code Cong & Ad News, p 1873 10-11

1968 US Code Congressional and Administrative News, p 1875 9-10

No. 82-1577

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

Appellee The Agricultural Marketing & Bargaining Board moves that this Honorable Court dismiss the appeal herein or, in the alternative, affirm the judgment of the Michigan Supreme Court, on the grounds that it is manifest that the question on which decision of this appeal depends is so unsubstantial as not to require further argument.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

In 1967, Congress enacted the Federal Fair Practices Act of 1967, 7 USC §§ 2301 *et seq* (hereafter the "Federal Act")

[Appellant's Appendix at A 84, hereafter "App A-84"] In its findings and declaration of policy the Federal Act states that it is the policy of Congress to "establish standards of fair practices required of handlers in their dealings in agricultural products." [App A-84] The Federal Act seeks to accomplish this goal by defining prohibited practices by handlers and granting the United States Department of Agriculture authority to enjoin such practices.

In 1972 the Michigan Legislature enacted the Agricultural Marketing and Bargaining Act, 1972 PA 344, as amended, MCLA 290.701 *et seq;* MSA 12.94(101) *et seq* (hereafter "Michigan Act"). [App A-89] The Michigan Act is enabling legislation which affords farmers the option of joining together and bargaining collectively. Like the Federal Act the Michigan Act defines prohibited practices by handlers. Both acts seek to foster and promote the efficient production and marketing of agricultural products by protecting the marketing and bargaining position of the individual producers. While the Federal Act attempts to do this solely through limiting handler coercion the Michigan Act extends into an area not regulated by Congress. Under the Michigan Act a framework for a marketing and bargaining procedure is instituted should a majority of the farmers producing a majority of the argrcultural commodity so choose. The Michigan Act is not preempted because it does not stand as a obstacle to the full purposes and objectives of the Federal Act.

B. **Parties**

Appellee Agricultural Marketing and Bargaining Board accepts Appellants Statement of the Case as it relates to the Parties.

C. Proceedings Below

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statement of the Case with respect to the proceedings below.

ARGUMENT

I.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. Congress Has Not Preempted The Field With Regard To Agricultural Marketing

The doctrine of federal pre-emption has its roots in Art VI, Clause 2 of the United States Constitution, the "Supremacy Clause", which elevates federal law above that of the states. On the other hand, under the 10th Amendment of the federal constitution, "the powers not designated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people".

Any analysis of whether Federal pre-emption has occurred must "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress". *Rice* v *Sante Fe Elevator Corporation*, 331 US 218, 230; 67 S Ct 1146; 91 L Ed 1447 (1947). Only when Congress has unmistakably so ordained that its enactments alone are to regulate a part of commerce, must state laws regulating that aspect of commerce fall. *Florida Lime and Avocado Growers, Inc.* v *Paul*, 373 US 132, 142; 83 S Ct 1210; 10 L Ed2d 248 (1963). Such a result will follow when Congress' command is explicitly stated in the statute's language or implicitly con-

tained within its structure and purpose. *Jones* v *Rath Packing Corporation*, 430 US 519, 525; 97 S Ct 1305; 51 L Ed2d 604 (1977).

Appellants correctly note that Congress did not intend to occupy the entire field of regulation or prohibit the states from enacting laws relating to agricultural marketing inasmuch as the Federal Act, 7 USC 2305(d) specifically states:

> "The provisions of this Chapter shall not be construed to change or modify existing state law nor to deprive the state courts of jurisdiction." [App A-88]

This manifest declaration of non-pre-emption represents a congressional intent not to intrude upon a state's regulation of agricultural marketing and bargaining and thereby to establish a policy favorable to state regulation.

B. No Conflict Exists Between The Federal Act and Michigan Act.

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray* v *Atlantic Richfield*, 435 US 151, 158; 98 S Ct 988; 55 L Ed2d 197 (1978). A conflict will be found where compliance with both Federal and state regulations is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. See, *Florida Lime and Avocado Growers Inc* v *Paul, supra* and *Jones* v *Rath Packing Corp, supra*, at 526, 541-542.

Appellants allege a conflict between the State Act and the Federal Act which is twofold. First, it is argued that the Michigan Act destroys the "farmer's right not to join or bargain

through a cooperative", a "right" said to be created by 7 USC § 2303(a). Second, it is argued that the Michigan Act eliminates the "handlers right to deal individually with a farmer", a "right" said to be created by 7 USC § 2304. A review of these sections, however, shows that no such rights were created and the Federal Act and Michigan Act are entirely consistent with one another.

C. **The Federal Act Creates No Absolute Right In Farmers To Join Or Not Join Or Bargain Through A Cooperative**

7 USC 2303(a) provides:

> "It shall be unlawful for any *handler* knowingly to engage or permit any employee or agent to engage in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of his right to join and belong to such an association; . . . . "

(Emphasis added) [App A-85]

Clearly, the above section is, as the Michigan Supreme Court noted [App A-10, fn 13 and text], specifically directed toward handler misconduct. The sole purpose of 7 USC §2303 is to define prohibited practices by handlers. 7 USC §2303(a) most certainly makes it unlawful for a handler to coerce a producer to either join or not join an association of producers. Such a prohibition, however, does not forbid a state from requiring exclusive representation of individuals where a majority of the producers, producing a majority of the agricultural commodity, so desire.

Nor does 7 USC § 2303(a) grant the producer an absolute right to deal directly with a handler. Its' sole purpose was to protect a producer from being unduly influenced by a handler in deciding whether or not to join a cooperative association. Hand Congress intended to instill in the producer a right to deal directly with the handler it is submitted it would have done so in a clear and unequivocal fashion and not in the circuitous manner which is being urged by Appellants.

D. The Federal Act Creates No Right In The Handlers To Deal Directly With An Individual Producer

(1) Legislative History

The second alleged "conflict" is the "handler's right to deal individually with a farmer", a right said to arise out of 7 USC § 2304, the disclaimer section of the Federal Act which provides:

> "Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producers membership in or contract within an association of producers, nor require a handler to deal with an association." [App A-86]

At the outset it should be understood that the Michigan Act does not require a handler to select or purchase from a particular producer. Nor does the Michigan Act prohibit a handler from purchasing from any producer it wishes. Finally a handler is not necessarily required to deal with the accredited association inasmuch as the Michigan Act affords to the handler the opportunity to "opt out" of negotiations. See 1972 PA 344, § 15, *supra*. [App A-105]

The Michigan Supreme Court correctly interpreted 7 USC § 2304 stating:

"The language of § 2304 does not justify the meaning plaintiffs assign to it. The disclaimer provisions, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase '[n]othing in this chapter', referring to the substantive and affirmative provisions of FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a 'disclaimer of intention' a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'. Section 2304 is nothing more than an explanation of what FAFPA was not intended to do. It did not, in disclaiming any 'Intention to prohibit normal dealing', thereby create or affirmatively protect an individual handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer neutral on *that* point. Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that FAFPA did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity."

[App A-8.]

The announced congressional finding and declaration of policy in 7 USC § 2301 supports such an interpretation as there is no evidence of Congressional intent to affirmatively create in the handler a right to deal individually with the farmer. 7 USC § 2301 states:

"Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products." [App A-84]

The aim of the Federal Act, which is testified to by the above-quoted section, is simply to protect farmers from handler coercion.

Further evidence that the Federal Act was not intended to affirmatively create rights can be found in its legislative history. The report of then Secretary of Agriculture Freeman to the Senate Committee on Agriculture and Forestry in support of the Federal Act demonstrates that its goal was to enhance producer bargaining power and not to create rights to deal individually. The Secretary's report, as contained in

1968 US Code Congressional and Administrative News, p 1875 states:

"Cooperative action in agricultural production and marketing is increasing. It is growing in response to the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.

These changes include the growing integration of production and marketing of agricultural products, the increased control of those functions by large, diversified corporations and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers.

It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargaining with processors and other buyers over the terms of sale of the producers' farm products. Cooperative bargaining has come into prominence as the old market system is being displaced by contractual arrangements in the production and marketing of agricultural products. We believe these trends will continue.

The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impediments confronting producers in organizing and operating their cooperative associations.

Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissension in the organization.

Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.

If this bill were enacted, many producers who fear harassment or discrimination would feel free to join a cooperative association. It should help producers use cooperatives as a more effective tool in marketing their products." 1968 US Code Cong & Ad News, p 1875.

The Secretary's interpretation is underscored by the Committee Report on 7 USC § 2304.

"Section 5[§ 2304] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so. While the proponents of the bill state in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The Committee felt that a clean state-

ment in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation; and has recommended inclusion of this section in the bill.

There are many good, sound economic reasons for handlers and producers to select customers and suppliers. The bill does not attempt to prevent these sound reasons from operating.

While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis, it does prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products." HR Rep No 824, S Rep No 474, 90th Cong 2d Sess, reprinted in 1968 US Code Cong & Ad News, p 1873.

Given this legislative history of 7 USC 2304 the Michigan Supreme Court was correct in concluding:

> "Section 2304's disclaimer of any congressional intent to affect preexisting freedom to deal individually cannot be read as a creation of new rights or an express new statutory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal." [App A-14]

(2) **Case Law**

Appellants argue that two federal cases represent authority for the proposition that a handler has a "right" to deal directly with an individual producer. *Garrison* v *Dairymen, Inc,* Civ. Action No. 80-1080-3, slip opinion (D SC, July 28, 1980) involved producers of milk who sought an injunction against a handler who refused to accept their milk unless they joined an association of milk producers. *Butz* v *Lawson Milk Co,* 386 F Supp 227 (ND Ohio 1974) concerned a handler that refused to deal with a producer who had assigned to a producer association the exclusive right to sell his milk. Even though both Courts ruled against handler coercion Appellants argue that in so doing the "right of the handler to deal individually" was found. Such an argument is directly traceable to *Butz, supra.* However, upon a close reading of that case it is clear that the "right" to which the Court was referring was not a statutory right at all.

In *Butz, supra,* a producer of milk had contracted with Lawson, a processor handler. Under the terms of the contract the producer was not under any agreement with an association to sell for him any milk which he produced. The contract further provided that should the producer enter into an agreement which would authorize an association to sell his milk, Lawson would be relieved of all further obligations to purchase from the producer. Subsequently, the producer did enter into a marketing agreement with an association.

The terms of the marketing agreement appointed the association as the sole and exclusive agent to sell all milk produced by the producer unless the producer secured written consent from the association to do otherwise. In addition, the marketing agreement provided that all other agreements or contracts with respect to the sale of milk were superseded so long as no conflict occurred with existing contracts. In the

event that a conflict did occur between the marketing agreement and a pre-existing contract the marketing agreement provided that the producer agreed to terminate such a contract at the earliest possible date. When notified that the producer entered into a marketing agreement, Lawson immediately terminated its contract with the producer.

The ultimate conclusion of the Court was that Lawson's termination of its contract with the producer was unlawful and in violation of 7 USC § 2303(a) in that it represented a refusal to deal with the producer solely because of his joining the association. This result was based on the fact that under the terms of the contract and marketing agreement the producer might have been permitted to deal directly with Lawson despite the marketing agreement with the association. The Court's statement that 7 USC § 2304 is "to protect the right of the handler to continue to deal with one of its producers directly even though he many become a member of an association", *Butz, supra* at p 227, was in reference to the pre-existing contractual right with the producer which was still viable despite the fact that the producer had entered into a marketing agreement with the association. It was not a finding that 7 USC § 2304 created a right in that handler, or any other, to deal individually with the producer.

Neither *Garrison, supra* or *Butz, supra* stand for the proposition that the Michigan Act's requirement for exclusive representation for all growers of an agricultural commodity is in conflict with the Federal Act.

Finally, any doubt as to whether compliance with both the Federal and Michigan Acts is a physical impossibility was resolved at trial. This is due to the fact that the operation of marketing and bargaining under the Michigan Act will not "trigger" federal enforcement action under Federal Act. This

fact was noted by the Circuit Court when it stated in its opinion:

> "The plaintiffs have directed the Court to *Jones* v *Rath Packing, supra,* for the proposition that the federal government has preempted the field of regulation. This case, as the Court understands it, stands for the proposition that state law must fall if it 'triggers' federal enforcement action.
>
> *There is nothing in the proofs which would convince the Court of this possibility. In fact the proofs appear to the contrary. Witness Torgerson, a USDA official, indicated compliance with AMABA would not 'trigger' federal enforcement of AFPA"*
>
> (Emphasis added) [App A-74]

In light of the foregoing it is abundantly clear that the Michigan Act is not pre-empted by the Federal Act and that the claim of unconstitutionality alleged by appellants is so unsubstantial as not to warrant further consideration by this Court.

CONCLUSION AND PRAYER

WHEREFORE, Appellee Agricultural Marketing and Bargaining Board respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument and said Appellee respectfully moves that this Honorable Court dismiss the appeal herein, or in the alternative affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Henry J. Boynton
Assistant Attorney General

Attorneys for Appellee The
Agricultural Marketing and
Bargaining Board

Business Address:
Plaza One Building, Suite One
Lansing, Michigan 48913

(517) 373-3517